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7 TONY HENDRIX,
8 Plaintiff,
9 v.
10 KRIS KINT, et al.,
11 Defendants.

Case No. [18-cv-06644-EMC](#)

ORDER OF DISMISSAL

Docket No. 1

12
13 **I. INTRODUCTION**

14 Tony Hendrix, an inmate at San Quentin State Prison, filed this *pro se* civil rights action
15 under 42 U.S.C. § 1983 complaining that excessive force was used during his arrest. His
16 complaint is now before the Court for review under 28 U.S.C. § 1915A.

17 **II. BACKGROUND**

18 Mr. Hendrix's complaint alleges that he was subjected to excessive force when he was shot
19 by a police officer during his early morning arrest on June 28, 2016. The Court will describe the
20 allegations of the complaint and then summarize state court proceedings because there is a
21 criminal conviction in place that is incompatible with the legal claim Mr. Hendrix wants to pursue
22 here.

23 A. Allegations of Complaint

24 Mr. Hendrix alleges in his complaint that Antioch police officers Kint and Hynes arrived at
25 his home at about 2:00 a.m. on June 28, 2016, in response to a call from his wife, Daphine.
26 Docket No. 1 at 3. Mrs. Hendrix had been "accidentally locked out of their home" and Mr.
27 Hendrix, who was inside sleeping, was unresponsive to her efforts to get into the house. *Id.* The
28 two police officers began knocking on windows in an attempt to awaken Mr. Hendrix; he awoke

1 to “aggressive knocking, asking who it was, only to get no response.” *Id.* Mr. Hendrix feared it
2 was someone who meant to harm him and “cautiously stepped out of his home *with his weapon at*
3 *his side and pointed downward by his leg. Without warning, being hidden behind a tree to the*
4 *right of plaintiff, Officer Kint immediately fires shots;* two of which [hit Mr. Hendrix] in the right
5 torso and right upper thigh.” *Id.* at 3-4 (emphasis added).

6 Mr. Hendrix sues Antioch police officers Kint and Hynes, as well as the Antioch Police
7 Chief, the City of Antioch, and the County of Contra Costa for violations of his Eighth
8 Amendment right to be free from excessive force.¹

9 B. The Criminal Conviction

10 Based on that same incident that occurred in the early hours of June 28, 2016, Mr. Hendrix
11 suffered a criminal conviction. Following a jury trial, he was convicted of assault with a firearm
12 on a peace officer, *see Cal Penal Code § 245(d)(1)*, and exhibiting a firearm in the presence of an
13 officer, *see Cal. Penal Code § 417(c)*, and was found to have personally used a firearm during the
14 commission of the assault, *see Cal. Penal Code § 12022.53(b)*. *See People v. Hendrix*, 2018 WL
15 36894931, *1 (Cal. Ct. App. Aug. 3, 2018). He was sentenced to a total prison term of 14 years.
16 *Id.*

17 The California Court of Appeal described the incident rather differently than does Mr.
18 Hendrix. As relevant here, the California Court of Appeal described evidence at trial that the
19 police went to the Hendrix residence in response to a call from Mrs. Hendrix that she had an
20 argument with Mr. Hendrix and had been locked out of the home. *Id.* At the home, the two
21 officers knocked on the front door as well as windows, but received no response. *Id.* Mrs.
22 Hendrix declined to leave the area, although the officers encouraged her to do so. *Id.* The
23 following then occurred:

24 Daphine [i.e., Mrs. Hendrix] went back up to the house to try get in
25 through the front door or window. [Officer] Kint was watching
26 from the walkway, and [Officer] Hynes was taking cover behind a

27 ¹ Although Mr. Hendrix pleads the claims as Eighth Amendment claims, the claims arise under the
28 Fourth Amendment. Claims of excessive force during an arrest are analyzed under the
reasonableness standard of the Fourth Amendment. *See Byrd v. Phoenix Police Dep’t*, 885 F.3d
639, 642 (9th Cir. 2018).

1 truck on the street. Then, appellant “barge[d]” out of the apartment,
2 yelling and screaming. Appellant and Daphine were arguing
“intently,” and although Kint could not hear their words, he believed
the dispute was about to get physical.

3 Kint decided he needed to separate the couple to prevent a physical
4 fight. As Kint approached them, however, he noticed that appellant
5 was holding a gun. *Appellant was screaming and waiving the gun*
around in an angry fashion. Kint yelled out to appellant. At trial,
he could not recall whether he yelled “police” or “drop the gun,”
or both. Appellant did not make a verbal response, but shifted his
attention to Kint and began to advance with his gun pointed at the
officer. Then Kint drew his weapon, moved so he was not a
stationary target, and fired five or six shots. Appellant fell to the
8 ground on his stomach and laid motionless with the gun by his right
hand.

9 *Id.* at *1-2 (emphasis added; first three bracket sets added).

10 **III. DISCUSSION**

11 A. Review Of Complaint

12 A federal court must engage in a preliminary screening of any case in which a prisoner
13 seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28
14 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any
15 claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or
16 seek monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b).

17 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a
18 right secured by the Constitution or laws of the United States was violated, and (2) that the
19 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487
20 U.S. 42, 48 (1988).

21 Excessive force claims which arise in the context of an arrest or investigatory stop of a free
22 citizen are analyzed under the Fourth Amendment reasonableness standard. *See Graham v.*
23 *Connor*, 490 U.S. 386, 394-95 (1989). To determine whether a use of force was objectively
24 reasonable, courts balance “the nature and quality of the intrusion on the individual’s Fourth
25 Amendment interests” against the “countervailing government interests at stake.” *Id.* at 396. This
26 “requires careful attention to the facts and circumstances of each particular case, including the
27 severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the
28 officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade

1 arrest by flight.” *Id.* “The second of these so-called *Graham* factors—whether there is an
2 immediate threat to the safety of the arresting officer or others—is the most important.” *Ames v.*
3 *King County, Washington*, 846 F.3d 340, 348 (9th Cir. 2017). “When an individual points his gun
4 ‘in the officers’ direction,’ the Constitution undoubtedly entitles the officer to respond with deadly
5 force.” *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013). If there was not a criminal
6 conviction in place, a claim would be stated against at least the shooting officer and perhaps other
7 defendants based on Mr. Hendrix’s allegation that officer Kint, without warning, shot him while
8 he had his gun at his side and pointed toward the ground. But the conviction changes things.

9 A prisoner may not bring an action for damages under § 1983 for a wrongful conviction
10 unless that conviction has been determined to be wrongful. *See Heck v. Humphrey*, 512 U.S. 477,
11 486-87 (1994). A conviction may be determined to be wrongful by, for example, being reversed
12 on appeal or being set aside when a state or federal court issues a writ of habeas corpus. *See id.*
13 The *Heck* rule also prevents an inmate from bringing an action that -- even if it does not directly
14 challenge the conviction -- would imply that his conviction was invalid. The practical importance
15 of this rule is that the conviction must be attacked successfully *before* the § 1983 action for
16 damages may be filed.

17 *Heck* generally does not bar claims for use of excessive force, even if the excessive force
18 was used during the course of an arrest, because such claims rarely imply the invalidity of most
19 subsequent convictions or sentences. For example, *Heck* will not bar a claim for excessive force
20 where the force used can be separated from the resisting behavior on which the conviction rests.
21 *See, e.g., Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (conviction for
22 resisting arrest did not result in *Heck* bar to claim for excessive force during arrest “when the
23 conviction and the § 1983 claim are based on different actions during ‘one continuous
24 transaction’”); *Smith v. City of Hemet*, 394 F.3d 689, 696-98 (9th Cir. 2005) (conviction for
25 resisting arrest did not result in a *Heck* bar to excessive force claim “because the excessive force
26 may have been employed against him subsequent to the time he engaged in the conduct that
27 constituted the basis for his conviction”); *Smithart v. Towery*, 79 F.3d 951, 952-53 (9th Cir. 1996)
28 (conviction, pursuant to guilty plea, for assault with a deadly weapon (i.e., a truck driven at police)

1 did not result in *Heck* bar to excessive force claim because the force allegedly was used after
2 plaintiff exited his vehicle). Similarly, *Heck* will not bar an excessive force claim where the
3 conviction rests on conduct that is unrelated to the suspect's interaction with the police. *See, e.g.,*
4 *Guerrero v. Gates*, 442 F.3d 697, 703-04 (9th Cir. 2006) (*Heck* did not bar excessive force claim
5 because conviction was for possession of narcotics, and the use of excessive force to effectuate the
6 arrest "does not preclude the possibility that Guerrero was still guilty of possession of narcotics").
7 *Heck* also will not bar an excessive force claim where one cannot determine the specific behavior
8 on which the conviction rests, as may occur with a guilty plea. *See, e.g., Reese v. County of*
9 *Sacramento*, 888 F.3d 1030, 1046 (9th Cir. 2018) (claim that officer used excessive force by
10 shooting suspect was not *Heck*-barred due to existence of conviction for drawing or exhibiting a
11 deadly weapon in a rude, angry, or threatening manner because that conviction was pursuant to a
12 no-contest plea and could have been based on suspect brandishing a knife at the police *or*
13 exhibiting a knife to his neighbor before the police even arrived); *Smith*, 394 F.3d at 698
14 (conviction, pursuant to a guilty plea, for resisting arrest did not result in *Heck* bar to excessive
15 force claim because the record did not reflect which acts underlay his plea).

16 But when the nature of the conviction is plainly inconsistent with the sort of excessive
17 force claim being asserted, *Heck* will apply. The case most instructive for present purposes is
18 *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002), where two robbers (Soly and Cunningham)
19 engaged in a shootout with police, leaving Soly dead and Cunningham injured. Cunningham was
20 later tried and convicted of three counts of attempted murder of the police officers by firing a
21 weapon at them, as well as the murder of Soly by provoking the police to shoot at the getaway car.
22 *Id.* at 1152. Cunningham filed a civil rights action, alleging the police used excessive force on
23 them by jamming their car after the robbery and firing on them without the police identifying
24 themselves as police. *Id.* at 1152-53. The Ninth Circuit noted that "an important touchstone is
25 whether a § 1983 plaintiff could prevail only by negating 'an element of the offense of which he
26 has been convicted,'" and agreed with the district court that "Cunningham's claims are barred
27 under Heck because the complaint disputed several factual issues that the state jury had already
28 resolved against him." *Cunningham*, 312 F.3d at 1154. Thus, Cunningham's claims were

1 “squarely barred to the extent they depend on the theory that he did not provoke” the shootout
2 because the jury instructions required the jury to find that he intentionally provoked the deadly
3 police response and did not act in self-defense in order to convict him of felony murder. *Id.*
4 Cunningham’s claim that the police responded with excessive force to Cunningham’s provocative
5 act of firing on the police was barred by *Heck* because, in convicting Cunningham, the jury
6 necessarily concluded that the police response was a natural consequence of Cunningham’s
7 provocative act. *Id.* at 1155. *Cunningham* teaches that an excessive force claim that is interwoven
8 with the § 1983 plaintiff’s behavior that led to his conviction can be barred by *Heck* if one can
9 look at the jury verdict to see what the jury had to find to convict.

10 Another case in which the § 1983 excessive force claim was rejected due to the conviction
11 in place is *Curry v. Baca*, 371 F. App’x 733 (9th Cir. 2010), where the Ninth Circuit concluded
12 that *Heck* barred an excessive force claim due to the plaintiff’s conviction of two counts of assault
13 on a peace officer with a semi-automatic firearm. “To find Curry guilty, the jury necessarily had
14 to decide that the officers did not use excessive force ‘at the time of the arrest.’” *Id.* at 733. The
15 court rejected the plaintiff’s efforts to separate his behavior from the forceful response. “The
16 allegedly excessive police conduct here—shooting Curry while pursuing him—falls within the
17 temporal scope of the assault because the moment Curry pointed his firearm at the officers, they
18 began pursuing him. Therefore, the officers’ use of force ‘is part of a single act for which the jury
19 found that [Curry bears responsibility.]’” *Id.* at 734.

20 In the present case, Mr. Hendrix’s not-yet-invalidated conviction under California Penal
21 Code § 245(d)(1), prevents him from pursuing his § 1983 claim that he was subjected to excessive
22 force. To understand why *Heck* bars Mr. Hendrix’s claim, one must consider the particular crime
23 of which he was convicted.

24 California Penal Code § 245(d)(1) provides: “Any person who commits an assault with a
25 firearm upon the person of a peace officer or firefighter, and who knows or reasonably should
26 know that the victim is a peace officer or firefighter engaged in the performance of his or her
27 duties, when the peace officer or firefighter is engaged in the performance of his or her duties,
28 shall be punished by imprisonment in the state prison for four, six, or eight years.”

1 The pattern jury instruction describes the requirements for a jury to find a defendant guilty
2 of the § 245(d)(1) offense:

3 To prove that the defendant is guilty of this crime, the People must
4 prove that:

- 5 1A. The defendant did an act with a firearm that by its nature would
6 directly and probably result in the application of force to a person;
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8 1B. The force used was likely to produce great bodily injury;
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10 2. The defendant did that act willfully;
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12 3. When the defendant acted, he was aware of facts that would lead
13 a reasonable person to realize that his act by its nature would
14 directly and probably result in the application of force to someone;
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16 4. When the defendant acted, he had the present ability to apply
17 force with a deadly weapon to a person;
18
19 5. When the defendant acted, the person assaulted was lawfully
20 performing his duties as a peace officer;

21 AND

- 22
23 6. When the defendant acted, he knew, or reasonably should have
24 known, that the person assaulted was a peace officer who was
25 performing his duties.

26 Judicial Council Of California Criminal Jury Instruction 860, Judicial Council Of California
27 Criminal Jury Instruction 860 (CALCRIM 860).

28 Mr. Hendrix's claim that officer Kint shot him without warning while he (Hendrix) held
and kept his gun pointed down and by his side is incompatible with Mr. Hendrix's conviction for
assault on a peace officer based on that same event. Mr. Hendrix essentially claims that he was
shot despite posing no threat. However, in order to have been convicted of an assault, Mr.
Hendrix had to do an "act with a firearm that by its nature would directly and probably result in
the application of force to a person," CALCRIM 860; that is inconsistent with him only holding a
gun by his side and pointed downward. Also, in order for Mr. Hendrix to have been convicted of
the assault on officer Kint, officer Kint had to be "lawfully performing his duties as a peace
officer," *id.*; that is incompatible with officer Kint shooting Mr. Hendrix while Mr. Hendrix held a
gun at his side and pointed at the ground.

29 A determination in this case that officer Kint used excessive force on Mr. Hendrix

1 therefore would imply that Mr. Hendrix's conviction under California Penal Code § 245(b)(1) was
2 invalid. Success on Mr. Hendrix's claim that he was shot by officer Kint while posing no danger
3 to him would necessarily imply the invalidity of Mr. Hendrix's conviction for assault with a
4 firearm on a peace officer that is based on the same interaction with police. *Heck* therefore bars
5 the excessive force claim.

6 The action will be dismissed. The dismissal of this action pursuant to the *Heck* rule is
7 without prejudice to Mr. Hendrix filing a new action asserting his claims if his conviction is ever
8 set aside, such as by being reversed on appeal.

9 If Mr. Hendrix wants to challenge his state court conviction in federal court, the exclusive
10 method by which to do so is to file a petition for writ of habeas corpus under 28 U.S.C. § 2254,
11 after his direct appeal is finished and after he exhausts state court remedies for all the claims in
12 such a petition.

13 **IV. CONCLUSION**

14 For the foregoing reasons, this action is **DISMISSED** for failure to state a claim upon
15 which relief may be granted.

16 The clerk shall close the file.

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18 **IT IS SO ORDERED.**

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20 Dated: April 16, 2019

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24 EDWARD M. CHEN
25 United States District Judge
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